Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____ 76-1735

MARABLE-PIRKLE, INC.,

Appellant,

versus

ED TURNER,

Appellee,

and

THE CITY OF ADEL,

Appellee.

JURISDICTIONAL STATEMENT OF APPEAL

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JURISDICTIONAL STATEMENT OF APPEAL

STATEMENT OF JURISDICTION

A: Reference to official and unofficial reports—unofficial report, 233 S.E. 2d 773.

B: Statement of jurisdictional grounds

(i) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257 (2). This is an appeal from the decision and judgment of the Supreme Court of the State of Georgia dated March 10, 1977, which decision and judgment reversed the summary judgment which had been granted in favor of appellant, Marble-Pirkle, Inc. This is also an appeal from the denial of the Motion for Rehearing filed

in behalf of Marable-Pirkle, Inc. and from the refusal of the Supreme Court of the State of Georgia to allow the filing of a second Motion for Rehearing by Marable-Pirkle, Inc.

(ii) Marable-Pirkle, Inc. is seeking the review of the decision and order of the Supreme Court of the State of Georgia dated March 10, 1977 and of the denial of the Motion for Rehearing of Marable-Pirkle, Inc., which denial occurred on March 22, 1977 and the refusal of the Supreme Court of the State of Georgia to allow the second Motion for Rehearing of Marable-Pirkle, Inc. to be filed, which refusal occurred on April 6, 1977. A notice of appeal has been filed in the Supreme Court of the State of Georgia on May 25, 1977.

(iii) This Honorable Court has jurisdiction under 28 U.S.C. §1257 (2).

(iv) Cases to sustain jurisdiction:

This honorable Court has jurisdiction of the appeal of Marable-Pirkle, Inc. because the validity of a state statute has been called in question and the Supreme Court of Georgia has affirmed the existence and availability of Ga. Code Ann. §3-1006 as a statute of limitations, while at the same time excluding Marable-Pirkle, Inc. from its protection.

Marable-Pirkle, Inc., after the decision by the Supreme Court of Georgia of March 10, 1977, made timely objections in order to bring the federal errors to the attention of the Supreme Court of Georgia in order to enable it to take corrective action. These attempts by Marable-Pirkle, Inc. were made in the first and second motions for rehearing. Such attempts preserved the federal questions for review by this court. *Charleston Federal S. & L. Association v. Alderson*, 324 U.S. 182 (1945). Besides the timely objection by Marable-Pirkle, Inc. to the March 10, 1977 decision of the Supreme Court of Georgia, the denial of the first Motion for Rehearing and the refusal by the Supreme Court of Georgia to allow the second Motion for Rehearing is sufficient finality and exhaustion of state remedies for this honorable Court to assume jurisdiction. *Citizen's Bank of Michigan City, Ind. v. Opperman*, 249 U.S. 448 (1919). Because Marable-Pirkle, Inc. has raised federal constitutional issues at the first instance, and because it has exhausted its state remedies which concluded with the refusal of the Supreme Court of Georgia to allow the filing of the second Motion for Rehearing, Marable-Pirkle, Inc. believes that it has procedurally preserved its right to appeal in order that it might bring its federal constitutional questions before this honorable Court.

Marable-Pirkle, Inc. also believes that it has not only preserved its rights to appeal, but also that the federal questions which have been preserved are of the type and of the requisite sufficiency to invoke this honorable Court's jurisdiction. In the present case, the Supreme Court of Georgia has held that Ga. Code Ann. §3-1006, a statute of limitations, is not applicable and, thus, unavailable to Marable-Pirkle, Inc. This decision by the Supreme Court of Georgia might be said to rest upon an independent, separate ground of local or general law concerning the construction of the statute; however, the effect of the decision by the Supreme Court of Georgia is to deny federal rights specifically raised and preserved by Marable-Pirkle, Inc. As this honorable Court has stated:

"Undoubtedly, the general rule is that where the judgment of a state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the federal right or immunity specifically set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specifically set up or claimed, and which, if recognized and enforced, would require a judgment different from the one resting upon some ground of local or general law."

Chicago, B & Q R. Co. v. Illinois ex rel Grimwood, 200 U.S. 561 (1905).

If the federal constitutional questions of Marable-Pirkle, Inc. be well taken, then the decision of the Supreme Court of Georgia could not be consistent either with the due process or equal protection clauses of the Constitution and the judgment of the Supreme Court of Georgia based merely upon grounds of local or general law [if this be the case] would be in error, for the federal constitutional questions, in essence, cover the whole case and are of such a nature that the rights of Marable-Pirkle, Inc. could not fully be determined without deciding them. Thus, the judgment of the Supreme Court of Georgia by its necessary operation denied Marable-Pirkle, Inc.'s claims based on the Constitution of the United States, such that this Court has jurisdiction to inquire whether the claims of Marable-Pirkle, Inc. under the federal Constitution are valid. See *West Chicago*

Street R. Co. v. Illinois ex rel Chicago, 201 U.S. 506 (1905).

By way of summary, the federal constitutional issues raised by Marable-Pirkle, Inc. are that the construction of Ga. Code Ann. §3-1006 by the Supreme Court of Georgia violated the equal protection and due process clauses of the federal Constitution and that the Supreme Court of Georgia could not affirm the validity of this statute while excluding Marable-Pirkle, Inc. from its protection.

In cases of this character, the Supreme Court of the United States has historically accepted the decision of the state court of last resort respecting the proper construction of the statute, but is necessarily duty bound to determine the questions raised under the federal Constitution upon its own judgment of the actual operation and effect of the statute irrespective of the form it bears or how it is characterized by the state courts. See generally regarding consideration by this Court or tax statutes: *Watters v. People of the State of Michigan*, 248 U.S. 65 (1918); *Wells Fargo & Co. v. State of Nevada*, 248 U.S. 165 (1918); *Crew Levick Co. v. Commonwealth*, 245 U.S. 292 (1917); *Brown-Foreman Company v. Commonwealth of Kentucky*, 217 U.S. 563 (1909); *Commercial National Bank of Ogden v. Chambers*, 182 U.S. 556 (1900); *First National Bank of Aberdeen v. County of Chehallis*, 166 U.S. 440 (1897). Marable-Pirkle, Inc. asks this Court to be concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state. As such, this Court is believed to have jurisdiction of this

appeal. *St. Louis S.W. Ry. v. Arkansas*, 235 U.S. 350, 362; *Kansas City Ry. v. Kansas*, 240 U.S. 227, 231; *Mountain Timber Co. v. Washington*, 243 U.S. 219. In short, Marable-Pirkle, Inc. appeals to this Court for a consideration of the effect of Ga. Code Ann. §3-1006 as construed by the Supreme Court of Georgia.

With respect to the construction given to Ga. Code Ann. §3-1006 by the Supreme Court of Georgia, Marable-Pirkle, Inc. is contesting the construction given to that statute because if the statute is, in fact, valid under the federal Constitution, then Marable-Pirkle, Inc. must fall within its protection under the federal Constitution. In this regard, Marable-Pirkle, Inc. does not claim that the statute in its entirety is invalid, nor does it claim that it is invalid for every purpose. The claim that this statute is invalid as applied in this particular set of facts is still sufficient to invoke this Court's jurisdiction because a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290 (1921); *Poindexter v. Greenhow*, 114 U.S. 270, 295; *St. Louis, Iron Mountain and Southern Ry. Co. v. Wynne*, 224 U.S. 354; *Kansas City Southern Ry. Co. v. Anderson*, 233 U.S. 325; *Yazoo and Mississippi R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217.

Even if this honorable Court should feel that the federal constitutional protection claimed by Marable-Pirkle, Inc. had been denied on non-federal grounds, it would still be within the province of this honorable Court to inquire whether the decision of the Supreme Court of Georgia rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be

thus avoided. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 282 (1932); see *Ward v. Love County*, 253 U.S. 17, 22; *Enterprise Irrigation District v. Canal Company*, 243 U.S. 157, 164; *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651, 655.

In short, Marable-Pirkle, Inc. appeals to this honorable Court to look to the operation and effect of Ga. Code Ann. §3-1006 as construed and applied by the Supreme Court of Georgia and to also consider if the decision of the Supreme Court of Georgia rests on a substantial state basis, even though the decision on its face may rest on non-federal grounds.

Marable-Pirkle, Inc. raised federal constitutional questions at the first opportunity, i.e., in its first Motion for Rehearing, which motion was denied. Marable-Pirkle, Inc. also sought to file a second Motion for Rehearing, but the Supreme Court of Georgia did not permit the filing of this motion. The Supreme Court of Georgia has refused to consider the question of the alleged violations of federal constitutional rights which are guaranteed to Marable-Pirkle, Inc. Marable-Pirkle, Inc. has, thus, been denied a forum within which to litigate its constitutional claims and the Supreme Court of Georgia has likewise refused to consider the constitutional issues. Marable-Pirkle, Inc. believes that it is a denial of due process and equal protection for the Supreme Court of Georgia to refuse Marable-Pirkle, Inc. a forum within which to litigate, and that it is likewise a denial of equal protection and due process for the Supreme Court of Georgia to refuse to decide constitutional questions properly raised. The constitutional rights of Marable-Pirkle, Inc. are denied as well by the refusal of the Supreme Court of Georgia

to decide the question as they are and would be by a decision of the Supreme Court of Georgia which in and of itself is erroneous. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 282 (1931); see *Greene v. Louisville and Interurban R.R. Co.*, 244 U.S. 499, 508; *Smith v. Cahoon*, 283 U.S. 553, 564.

The constitutional guarantees of equal protection and due process apply to judicial interpretations of statutes, as well as to legislative enactments. *Brinkerhoff-Farris Trust and Savings Co. v. Hill*, 281 U.S. 673, 680 (1930).

The federal due process violations are, of course, the refusal of the Supreme Court of Georgia to afford a forum for the litigation of the constitutional questions raised by Marable-Pirkle, Inc. and the exclusion of Marable-Pirkle, Inc. from the saving grace of the statute of repose. The federal equal protection violation is the arbitrary and unreasonable classification which the Supreme Court of Georgia has created in construing Ga. Code Ann. §3-1006 so as to exclude Marable-Pirkle, Inc. and all other electrical contractors similarly situated from the protection of that statute. The March 10, 1977 decision of the Supreme Court of Georgia makes no reference or explanation on its face for the construction of Ga. Code Ann. §3-1006 so as to exclude the type of improvements performed by Marable-Pirkle, Inc., nor does Ga. Code Ann. §3-1006 on its face provide for any such distinction. Absent a classification resting upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike, and absent an opportunity in the Supreme Court of Georgia to have heard the constitutional questions raised by Marable-Pirkle, Inc., there has been a

denial of the equal protection and due process rights of Marable-Pirkle, Inc. by the Supreme Court of Georgia. See *F. S. Royster, Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); and see *Greene v. Louisville and Interurban R.R. Co.*, 244 U.S. 499, 508; *Smith v. Cahoon*, 283 U.S. 553, 564.

A civil litigant may, of course, seek review in this honorable Court of any federal claim properly asserted and rejected by state courts. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975). If this honorable Court should feel that Marable-Pirkle, Inc. should not have appealed to this court, but rather should have petitioned for certiorari, Marable-Pirkle, Inc. requests that the Court not dismiss this appeal as improvidently taken, but rather consider it as a petition for certiorari.

The actions of the Supreme Court of Georgia construing Ga. Code Ann. §3-1006 in a manner so as to exclude Marable-Pirkle, Inc. from its protection and the refusal of the Supreme Court of Georgia to provide a forum for the litigation of the federal constitutional issues properly raised by Marable-Pirkle, Inc. are the types of constitutional infirmities which deserve a thorough review by this Court.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administrated by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."
>
> *Yick Wo v. Hopkins*, 118 U.S. 356, 373-4 (1886).

The right to have a federal constitutional issue adjudicated by a court on a basis equal with others simi-

larly situated is a fundamental right. The decision below has created an arbitrary and unconstitutional scheme of classification that deprives Marable-Pirkle, Inc. of such constitutional rights without due process of law. Marable-Pirkle, Inc. prays that this Court note jurisdiction of this appeal.

QUESTIONS PRESENTED

1. Whether the exclusion of Marable-Pirkle, Inc. from the saving grace of Ga. Code Ann. §3-1006 is a violation of the equal protection clause of the United States Constitution.

2. Whether the creation of apparent classifications within Ga. Code Ann. §3-1006 by the Supreme Court of Georgia has the effect of excluding Marable-Pirkle, Inc. from the protection of Ga. Code Ann. §3-1006 so as to violate the due process clause of the United States Constitution.

3. Whether the due process clause of the United States Constitution is violated when the Supreme Court of Georgia refuses to grant motions for rehearing where federal constitutional issues can first be raised only upon motion for rehearing and where federal constitutional issues are properly so raised by motions for rehearing.

STATEMENT OF THE CASE

This is an appeal by an electrical contractor, Marable-Pirkle, Inc., from the March 10, 1977 decision of the Supreme Court of Georgia from a subsequent denial of its first Motion for Rehearing and of the refusal by

the Supreme Court of Georgia to allow the filing of its second Motion for Rehearing. For the purposes of this appeal, Marable-Pirkle, Inc. asks the court to accept the following facts as true:

In 1964, Marable-Pirkle, Inc. was employed by the City of Adel as an electrical contractor to convert the entire electrical distribution system of the city to a higher voltage. This required the removal of every transformer in the system and replacement with a transformer of greater capacity. This conversion also required the replacement of lightning arresters, fuse cut-outs, and other hardware on the poles with similar equipment of greater capacity. In January of 1965, Marable-Pirkle, Inc. completed work on the pole in question except for the flicking of a switch on each pole, including the subject pole, on the day of the total system conversion when the voltage increase was implemented. In March of 1965, the conversion of the entire electrical distribution system was substantially completed and the change over to the higher voltage occurred, including the flicking of the switch on the pole in question.

After completion of Marable-Pirkle, Inc. of its contract with the city in March of 1965, Marable-Pirkle, Inc. departed and left the subsequent maintenance and repair of the electrical distribution system to the City of Adel.

In 1968, approximately three years after Marable-Pirkle, Inc. had completed the conversion of the city's electrical transmission system, the Georgia General Assembly enacted G.L. 1968, pp. 127-29 (Ga. Code Ann. § 3-1006). The pertinent part of this statute provides:

"No action to recover damages for any deficiency

> in the construction of an improvement to real property . . . shall be brought against any person performing . . . the . . . construction of such an improvement more than eight years after substantial completion of such improvement."

The entirety of this statute is contained in the appendix hereto, as are other related statutes.

In April, 1973, more than eight years after substantial completion by Marable-Pirkle, Inc. of its work on the pole in question and on the entire system, the plaintiff, Ed Turner, received personal injuries. Ed Turner was injured when a roto-tiller which he was operating came in contact with a ground wire running from a utility pole that was owned and operated by the City of Adel. The ground wire which he unearthed should not have been energized, but apparently was energized, and consequently caused his injuries.

Between the time of completion of the work performed by Marable-Pirkle, Inc. in March of 1965 and the plaintiff's injuries, Gibson Electric, Inc. performed work on the city's electrical distribution system, which may or may not have created the condition which injured the plaintiff. Similarly, Gibson Electric, Inc. may have overlooked or failed to discover the existence of the energized ground wire.

After his injuries, the plaintiff, Ed Turner, sued the City of Adel, Marable-Pirkle, Inc. and Gibson Electric, Inc. The City of Adel cross-claimed against Marable-Pirkle, Inc. Marable-Pirkle, Inc. contended that Ga. Code Ann. §3-1006 barred any action against it because it had substantially completed its work on the electrical improvements more than eight years before the

alleged injury occurred. Marable-Pirkle, Inc. brought a motion for summary judgment in the Superior Court of Fulton County, Georgia, where the lawsuit was pending, said motion being with respect to the plaintiff's claim and the cross-action of the City of Adel.

The trial judge found, on the basis of the summary judgment evidence, that eight years had elapsed between substantial completion and the date of injury, and, citing Ga. Code Ann. §3-1006, rendered summary judgment in favor of Marable-Pirkle, Inc. and against the plaintiff, Ed Turner, and against the City of Adel.

Both the plaintiff and the City of Adel appealed to the Georgia Court of Appeals. Because of constitutional issues, the Court of Appeals transferred both appeals to the Supreme Court of Georgia. Marable-Pirkle, Inc. did not raise federal constitutional questions in the Court of Appeals of Georgia, as it was not contesting at that time the validity, as construed, of Ga. Code Ann. §3-1006.

The Supreme Court of Georgia, by decision dated March 10, 1977, held that Ga. Code Ann. §3-1006 was not available to Marable-Pirkle, Inc. as a defense to the plaintiff's complaint nor to the cross-action of the City of Adel because the words "improvement to real property" did not mean improvements placed on an electrical power pole. Prior to this decision, Marable-Pirkle, Inc. had not contested the validity of Ga. Code Ann. §3-1006 as construed by the Supreme Court of Georgia. Marable-Pirkle, Inc. believes that the March 10, 1977 decision of the Georgia Supreme Court affirmed the validity of Ga. Code Ann. §3-1006, while denying that it applied to Marable-Pirkle, Inc. or to the general electrical contracting industry.

On March 21, 1977, within the time permitted by the Supreme Court of Georgia, Marable-Pirkle, Inc. filed its first Motion for Rehearing with respect to the plaintiff's appeal and the appeal of the City of Adel. This was the first opportunity for Marable-Pirkle, Inc. to contest the validity of Ga. Code Ann. §3-1006 as construed by the Supreme Court of Georgia. The first Motion for Rehearing raised the federal constitutional questions upon which review is sought in this honorable Court, to wit: that the Supreme Court of Georgia overlooked and violated the equal protection clause of the Fourteenth Amendment of the United States Constitution by excluding Marable-Pirkle, Inc. and all other electrical contractors similarly situated from the protection of Ga. Code Ann. §3-1006 through the impermissible method of an invidious, arbitrary, and unreasonable classification; that the Supreme Court of Georgia overlooked and violated the due process clause of the Fourteenth Amendment of the United States Constitution by excluding Marable-Pirkle, Inc. and all other electrical contractors similarly situated from the defense afforded by Ga. Code Ann. §3-1006 through the constitutionally impermissible method of an invidious, arbitrary, and unreasonable classification.

The Supreme Court of Georgia on March 22, 1977 denied the first Motion for Rehearing with respect to the appeal involving the plaintiff, Ed Turner, and with respect to the appeal of the City of Adel. This ruling was communicated by post card with the post card merely indicating that the Motion for Rehearing was "denied".

On April 1, 1977, Marable-Pirkle, Inc. attempted to file its second Motion for Rehearing in the appeal involving the plaintiff and the appeal involving the City of Adel. The second Motion for Rehearing incorporated earlier arguments raised by Marable-Pirkle, Inc. in its first Motion for Rehearing regarding the unconstitutionality of Ga. Code Ann. §3-1006 as construed and applied, and the second Motion for Rehearing also sought some clarification from the Supreme Court of Georgia concerning the constitutional questions which Marable-Pirkle, Inc. had raised. Marable-Pirkle, Inc. had timely sought to file its second Motion for Rehearing, but the Supreme Court of Georgia exercised its discretion and refused to allow the filing of the second Motion for Rehearing. This refusal occurred on April 6, 1977 and was again made by post card. The post card was without other explanation except to indicate that the motion was refused for filing. The refusal of the Supreme Court of Georgia to file the second Motion for Rehearing exhausted the remedies available to Marable-Pirkle, Inc. in the appellate courts of Georgia to contest the validity of the March 10, 1977 decision of the Georgia Supreme Court.

SUBSTANTIAL FEDERAL QUESTIONS

The federal questions raised by this appeal are interrelated. Marable-Pirkle, Inc. seeks by appeal the review of this honorable Court of the Supreme Court of Georgia's decision of March 10, 1977 and the denial of the Supreme Court of Georgia of the first Motion for Rehearing filed in behalf of Marable-Pirkle, Inc. and the refusal of the Supreme Court of Georgia to allow the filing of the second Motion for Rehearing. The appeal has been taken to this honorable Court because the federal questions involved are substantial.

Marable-Pirkle, Inc. has been deprived of equal protection and due process as guaranteed by the federal Constitution by the construction of a state statute in a manner which appears to create arbitrary and unreasonable classifications, which classifications exclude from the protection of Ga. Code Ann. §3-1006 Marable-Pirkle, Inc. and all other electrical contractors similarly situated. When Marable-Pirkle, Inc. brought these constitutional violations to the attention of the Supreme Court of Georgia by motions for rehearing, an additional due process violation occurred because the Supreme Court of Georgia refused to provide a forum, even though it was the court of last resort, to consider the constitutional questions. These constitutional infringements represent substantial federal questions.

Ga. Code Ann. §3-1006 is not alone as a statute of repose, for substantially similar statutes have been enacted in approximately 24 states. See *Alaska Stat.*, §90.10.055; *Ark. Stat. Ann.* §37-237; *Cal. Civ. Pro. Code* §337.1; *Fla. Stat. Ann.* §95.11(10); *Idaho Code Ann.* §5-241; *Ind. Ann. Stat.* §2-639 to 2-642; *Kan. Stat. Ann.* §60-513; *La. Rev. Stat. Ann.* §9:2772; *Mich. Comp. Laws Ann.* §600.5839; *Miss. Code Ann.* §720.5; *Nev. Rev. Stat.* §11.205; *N. H. Rev. Stat. Ann.* §508.4-B; *N. J. Stat. Ann.* §2A:14-1.1; *N. M. Stat. Ann.* §23-1-26; *N. C. Gen. Stat.* §1-50; *N. D. Cent. Code* §28-01-44; *Ohio Rev. Code Ann.* §2305.131; *Ok. Stat. Ann.* Tit. 12, §109; *Pa. Stat. Ann.* Tit. 12, §65.1; *S. Dak. Compiled Laws* Chapter 15-2-9; *Utah Code Ann.* §78-12-25.5; *Va. Code Ann.* §8-24.2; *Wash. Rev. Code Ann.* §416.300-320. All of these statutes have as their central purpose the protection of contractors, architects, engineers and designers from liability throughout their lifetimes for construction long since completed. The decline of privity

as a defense has had wide ramifications for architects, contractors and engineers who have recently become burdened with new liability due to amenability to third party suits. Since third parties have no action against a negligent architect, contractor, or engineer until injury, which may occur many years after performance of services by the architect, contractor, or engineer, the legislatures of many states have acted to protect architects, contractors, and engineers from an unlimited period of liability for completed work. See "Comments/ Limitation of Actions Statute for Architects and Builders —Blueprints for Non-action", 18 Cath. U. L. Rev. 361 (1969). The present litigation involving Marable-Pirkle, Inc. is a prime example of the type of case which Ga. Code Ann. §3-1006 and similar statutes were designed to correct. Appellant, Marable-Pirkle, Inc., is defending a claim for personal injuries which occurred in the ninth year after the improvements performed by Marable-Pirkle, Inc. were completed, accepted and paid for. The City of Adel has been in possession of the subject improvements since 1965, and Marable-Pirkle, Inc. has had neither the duty, opportunity, or legal right to either inspect or maintain the property of the City of Adel, i.e., the electrical distribution system. Furthermore, subsequent to 1965, both the City of Adel and Gibson Electric, Inc. have worked on the subject improvements.

It would be of great benefit to the electrical contracting industry in Georgia and throughout this country, as well as of great benefit to all other contractors, engineers, and architects to receive a ruling from this honorable Court which gives guidance to the state courts requiring that Ga. Code Ann. §3-1006, as a representative statute, be construed to apply in an even

handed fashion to all contractors, architects, and engineers regardless of their building "trade".

The subject case thus poses substantial federal questions for this Court's review. A ruling by this Court would provide guidance to the state courts and relief to architects, contractors, and engineers throughout this country from stale claims, evidentiary problems, and unlimited terms of potential liability. By requiring a proper, constitutionally acceptable construction of Ga. Code Ann. §3-1006, this Court can provide a landmark ruling which will have the effect of lessening congested court dockets throughout the nation. A ruling by this court would also secure the benefits of these statutes of repose to all contractors, architects, and engineers and prevent invidious classifications and arbitrary exclusions under these statutes. Such a ruling would have a profound effect nationwide.

With respect to the failure of the Supreme Court of Georgia to allow Marable-Pirkle, Inc. a hearing on the constitutional issues, a ruling by this court would reaffirm and establish more clearly with respect to all the states the supremacy of the federal courts over the state courts where federal rights are litigated. The effect of the decision of the Georgia Supreme Court is to effectively thrust all state court litigants into the federal courts for a hearing regarding their federal rights as affected by state law, thereby denying the citizens of the State of Georgia due process of law and at the same time burdening the federal courts. Ever since *Martin v. Hunter's Lessee*, 1 Wheat 304 (1816), this honorable Court has exercised supervisory control through appellate jurisdiction over state courts as the Constitution and laws of the United States constitute the supreme

law of the land, binding on the judges in every state, anything in the constitution or laws of the states to the contrary notwithstanding. Marable-Pirkle, Inc. believes that the refusal by the Supreme Court of Georgia to allow a rehearing by Marable-Pirkle, Inc. after constitutional issues were first raised, whether or not authorized by the state constitution or its laws, constitutes a denial of due process of law to Marable-Pirkle, Inc. and to all other litigants in Georgia where motions for rehearing raising constitutional issues are denied without a hearing. The fundamental question is whether a state court must provide a forum for the litigation of federal rights. It is believed that this question must be answered in the affirmative in order to preserve our federal system and the dominance of the Constitution of the United States as the supreme law of the land.

CONCLUSION

For the foregoing reasons, the appeal of Marable-Pirkle, Inc. should be granted and this Court should note jurisdiction.

Respectfully submitted,
NEELY, NEELY & PLAYER

By: /s/ EDGAR A. NEELY, JR.
EDGAR A. NEELY, JR.
Attorney for Appellant
3100 Peachtree Summit
Atlanta, Georgia 30308

Of Counsel:
NEELY, NEELY & PLAYER
3100 Peachtree Summit
Atlanta, Georgia 30308

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing Jurisdictional Statement of Appeal to the Supreme Court of the United States by depositing three copies of the same in the United States Mail with sufficient postage affixed thereto, addressed to each of the following:

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and

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and

HON. VIRGIL GRIFFIS
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Attorneys for Gibson Electric, Inc.

HON. SIDNEY F. WHEELER
Long, Weinberg, Ansley & Wheeler
3000 The Equitable Building
Atlanta, Georgia 30303

This 16th day of June, 1977.

/s/ EDGAR A. NEELY, JR.
EDGAR A. NEELY, JR.
Attorney for Appellant

APPENDICES

APPENDICES

Appendix A—Opinion of the Supreme Court of Georgia entered March 10, 1977

Appendix B—Denial by the Supreme Court of Georgia of the first Motion for Rehearing by Marable-Pirkle, Inc. with respect to the plaintiff's appeal

Appendix C—Denial by the Supreme Court of Georgia of the first Motion for Rehearing of Marable-Pirkle, Inc. with respect to the appeal of the City of Adel

Appendix D—Refusal by the Supreme Court of Georgia to allow the filing of the second Motion for Rehearing

Appendix E—Copy of Notice of Appeal filed in the Supreme Court of Georgia on May 25, 1977

Appendix F—Georgia Code Annotated §3-1006

Appendix G—Georgia Code Annotated §3-1007

Appendix H—Georgia Code Annotated §3-1008

Appendix I—Georgia Code Annotated §3-1009

Appendix J—Georgia Code Annotated §3-1010

Appendix K—Georgia Code Annotated §3-1011

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

[Decided: March 10, 1977]

31711. TURNER v. MARABLE-PIRKLE, INC., et al. (659)

31712. CITY OF ADEL v. MARABLE-PIRKLE, INC. (759-6)

GUNTER, Justice.

These appeals by Turner and the City of Adel are from a summary judgment rendered in favor of Marable-Pirkle, Inc. that dismissed it as one of the defendants in the trial court.

The plaintiff Turner received serious personal injuries in April of 1973 when a roto-tiller that he was operating came in contact with a ground wire running from a utility pole that was owned and operated by the City. The ground wire was energized; it should not have been energized; and Turner sued the City and other defendants, including Marable-Pirkle, for the injuries sustained.

In 1964 Marable-Pirkle, Inc. was employed by the City as an independent contractor to convert the City's electrical distribution system to a higher voltage system. This required the removal of every transformer in the system and replacement of each transformer with a transformer of greater capacity. This conversion also required the replacement of lightning arrestors, fuse cutouts, and other hardware on the poles with similar equipment of greater capacity. In January and March of 1965, Marable-Pirkle converted the particular utility pole involved in this litigation.

In 1968, approximately three years after Marable-Pirkle had completed the conversion of the City's electrical transmission system, the General Assembly enacted Ga. L. 1968, pp. 127-29 (Code Ann. Sec. 3-1006). The pertinent part of this statute provides: "No action to recover damages for any deficiency in the construction of an improvement to real property . . . shall be brought against any person performing . . . the . . . construction of such an improvement more than eight years after substantial completion of such an improvement."

Marable-Pirkle contended that this statute barred an action against it, because it had substantially completed its work on the electrical improvements more than eight years before the alleged injury occurred. The trial judge found, on the basis of the summary judgment evidence, that eight years had elapsed between substantial completion and the date of the injury, and, citing the 1968 statute, he rendered summary judgment in favor of Marable-Pirkle and dismissed Marable-Pirkle as a party to the litigation.

Both Turner and the City, which had cross-claimed against Marable-Pirkle, have appealed.

These appeals originally went to the Court of Appeals, but since constitutional issues were raised, the Court of Appeals transferred them to this court.

We conclude that the issue raised here can be determined by our construction of the 1968 statute, and it is unnecessary to reach any constitutional issue.

The 1968 statute, as we read it, is applicable only to "an improvement to real property"; and the words, "an improvement to real property," as used in the statute, do not mean improvements (the change of

equipment) placed on an electrical power pole.

Section 6 of the statute reads: "As used in this Act the phrase 'substantial completion' shall mean the day when construction was sufficiently completed, in accordance with the contract, as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended."

The erection of a power pole, and the placing of the necessary equipment thereon, for the transmission of electricity is not such an improvement to real estate as was contemplated by the 1968 statute. And, as in this case, the mere changing or replacement of such equipment on a pole already erected is not an improvement to realty pursuant to this statute. Therefore, the statute simply is not applicable in this case; it does not constitute a bar to the plaintiff's action; and the trial judge committed error in granting summary judgment and dismissing Marable-Pirkle as a party defendant. The judgment must be reversed and the case returned to the trial court for further proceedings.

Judgment reversed. All the Justices concur.

APPENDIX B

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 3-22-77

The motion for a rehearing was denied today:

Case No. 31711, Turner v. Marable-Pirkle, Inc., et al

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Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

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401 West Peachtree St., N.W.
Atlanta, GEORGIA 30308

APPENDIX C

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 3/22/77

The motion for a rehearing was denied today:

Case No. 31712, City of Adel v. Marable-Pirkle Inc., et al.

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

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Mr. Andrew J. Hamilton
ATTORNEY AT LAW
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c/o Healy, Healy & Player
3100 P'tree Summit
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30303

APPENDIX D

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 4/6/77

The motion for a rehearing was ~~denied today~~: 2nd not allowed filed.

Case No. 31711, Turner v. Marable-Pirkle, Inc., etal.

31712. City of Adel v. "

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

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APPENDIX E

IN THE SUPREME COURT OF THE STATE OF GEORGIA

[Filed in Clerk's Office May 25, 1977,
By Hazel E. Hallford, Deputy Clerk]

ED TURNER, *Appellant,* v. MARABLE-PIRKLE, INC., et al, *Appellee.*	CASE NO. 31711
and	
CITY OF ADEL, *Appellant,* v. MARABLE-PIRKLE, INC., et al, *Appellee.*	CASE NO. 31712

NOTICE BY MARABLE-PIRKLE, INC., OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

COMES NOW MARABLE-PIRKLE, INC. and serves and files in this court its notice of appeal to the Supreme Court of the United States and states the following:

1.

This notice of appeal is filed within 90 days from the March 10, 1977 decision of this Honorable Court, and within 90 days from the denial of re-hearing and the refusal to allow the filing of the second motion for re-hearing, and as such, is timely made.

2.

The party taking the appeal is Marable-Pirkle, Inc.

3.

Marable-Pirkle, Inc. appeals from the opinion and judgment of the Supreme Court of Georgia dated March 10, 1977.

4.

Marable-Pirkle, Inc. appeals from the order of the Supreme Court of Georgia denying the first motion for re-hearing filed by Marable-Pirkle, Inc., which first motion for re-hearing was denied on March 22, 1977.

5.

Marable-Pirkle, Inc. appeals from the refusal of the Supreme Court of Georgia to allow the filing of the second motion for re-hearing in behalf of Marable-Pirkle, Inc., which refusal to file occurred on April 1, 1977.

6.

This appeal is taken to the Supreme Court of The United States under 28 U.S.C. §1257 (2).

7.

A copy of this notice of appeal is being duly served upon all counsel of record. A certificate of service is attached with this notice of appeal as proof of such service.

NEELY, NEELY & PLAYER

By: /s/ EDGAR A. NEELY, JR.
EDGAR A. NEELY, JR.

Attorney for Petitioner, MARABLE-PIRKLE, INC., as Member of the Bar of the Supreme Court of the State of Georgia and as Member of the Bar of the Supreme Court of the United States.

3100 Peachtree Summit
401 West Peachtree Street, N.W.
Atlanta, Georgia 30308
Telephone: 404/681-2600

CERTIFICATE OF SERVICE

I hereby certify that I have served the below listed counsel of record by depositing the foregoing Notice of Appeal and this Certificate of Service in a United States Post Office or mail box with first class postage pre-paid addressed to counsel of record at the post office addresses shown below.

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This 25th day of May, 1977.

/s/ EDGAR A. NEELY, JR.
EDGAR A. NEELY, JR.

APPENDIX F

3-1006 Deficiencies in connection with improvements to real property

No action to recover damages

(1) for any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction or construction of an improvement to real property,

(2) for injury to property, real or personal, arising out of any such deficiency, or

(3) for injury to the person or for wrongful death arising out of any such deficiency,

shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.

(Acts 1968, p. 127.)

APPENDIX G

3-1007 Same; injury to person or property, or wrongful death arising out of such deficiency

Notwithstanding the provisions of section 3-1006, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the seventh or eighth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred (irrespective of the date of death) but in no event may such an action be brought more than 10 years after the substantial completion of construction of such an improvement.

(Acts 1968, pp. 127, 128.)

APPENDIX H

3-1008 Same; no extension of period of limitations prescribed by other law

Nothing in this law [§§ 3-1006 through 3-1011] shall extend the period of limitations prescribed by the law of this State for the bringing of any action or postpone the time as of which a cause of action accrues.

(Acts 1968, pp. 127, 128.)

APPENDIX I

3-1009 Same; when limitations prescribed by this law may not be asserted as a defense

The limitation prescribed by this law [§§ 3-1006 through 3-1011] shall not be asserted as a defense by any person who would otherwise be entitled to its benefits but who is in actual possession or control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency of such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(Acts 1968, pp. 127, 128.)

APPENDIX J

3-1010 Same; "person" defined

As used in this law [§§ 3-1006 through 3-1011], the term "person" shall mean an individual, corporation, partnership, business trust, unincorporated organization, association, or joint stock company.

(Acts 1968, pp. 127, 128.)

APPENDIX K

3-1011 Same; "substantial completion" defined

As used in this law [§§ 3-1006 through 3-1011] the phrase "substantial completion" shall mean the date when construction was sufficiently completed, in accordance with the contract, as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended.

(Acts 1968, pp. 127, 128.)